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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1215

MARY CARNERA, General Administratrix of the Estate of SEVERINO CARNERA, deceased; and MARY CARNERA, Administratrix *ad Prosequendum* of the Estate of SEVERINO CARNERA, deceased,

Petitioner,

vs.

LANCASTER CHEMICAL CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No. _____

MARY CARNERA, General Administratrix of the Estate of Severino Carnera, deceased; and MARY CARNERA, Administratrix *ad Prosequendum* of the Estate of Severino Carnera, deceased,

Petitioner,

vs.

LANCASTER CHEMICAL CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Mary Carnera, General Administratrix of the Estate of Severino Carnera, deceased; and Mary Carnera, Administratrix *ad Prosequendum* of the Estate of Severino Carnera, deceased, prays that a Writ of Certiorari issues to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on December 8, 1967.

Citations to Opinion Below

The opinion below is unreported and is printed in Appendix "A" hereto *infra*. The opinion of the District Court, printed in Appendix "C" hereto *infra* is apparently unreported.

Jurisdiction

The judgment of the Court of Appeals was entered on December 8, 1967. The judgment of this Court is invoked under 28 U.S.C. Section 1254 (1).

Question Presented

Was not the intent of Congress in enacting 28 U.S.C. Section 1332 (c) to limit the case load of the Federal Court brought by corporate litigants?

Statutes Involved

The statutes in question in the matter *sub judice* is 28 U.S.C. Section 1332 (c).

Statement

The petitioner submits that the intent of congress in enacting 28 U.S.C. Section 1332 (c) was to limit the case load in the Federal Court brought by corporate litigants.

Reasons for Granting the Writ

The petitioner respectfully submits that the Writ of Certiorari sought herein should be granted because the *per curiam* opinion of the Third Circuit decides a case of Federal Law which to the petitioner's knowledge has not been but should be settled by this Court; and petitioner further urges that the opinion below so far departs from the accepted and usual course of judicial proceedings as to warrant the exercise of this Court's supervision.

More particularly petitioner urges that it was not the intent of Congress in enacting 28 U.S.C. 1332 (c) to deny jurisdiction to individual citizen litigants but rather was intended only to limit the case load in the Federal Court brought by corporate litigants and in support of her position petitioner respectfully urges the language set forth in the Congressional Record of 1958, at pages 12,683 thru 12,690, where her position is respectively supported by the language of Congressman Smith of Virginia, Congressman Cellar of New York and Congressman Keating of New York.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JACK MANDELL,
Counsel for Petitioner,
1180 Raymond Boulevard,
Newark, New Jersey.

[APPENDICES FOLLOW]

APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 16542

MARY CARNERA, General Administratrix of the Estate of Severino Carnera, deceased; and MARY CARNERA, Administratrix *ad Prosequendum* of the Estate of Severino Carnera, deceased,

Appellants,

v.

LANCASTER CHEMICAL CORPORATION.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued November 21, 1967

Before HASTIE, FREEDMAN and VAN DUSEN, *Circuit Judges*

OPINION OF THE COURT

(Filed December 8, 1967)

PER CURIAM

This personal injury and death case is before the court on appeal from a District Court order, dismissing the ac-

tion for lack of subject matter jurisdiction due to failure of plaintiff to allege in the Complaint or prove[1] that the principal place of business of the defendant corporation was not in New Jersey, of which state the appellant-fiduciary is admittedly a citizen. See 28 U.S.C. § 1332(c); *Kelly* v. *United States Steel Corporation,* 284 F. 2d 850 (3rd Cir. 1960). Also, appellant has not sustained her burden of proving that the corporate veil of the appellee parent corporation should be pierced to permit her to show that its business and that of its subsidiaries was a unitary enterprise with a principal place of business in Delaware.[2] See *Coryell* v. *Phipps,* 128 F. 2d 702, 704 (5th Cir. 1942), aff'd on other grounds, 317 U. S. 406 (1943); *Zubik* v. *Zubik and Drambel,* —— F. 2d —— (3rd Cir. No. 15,940, opinion of 9-29-67, at pp. 5 & 9).

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[1] As stated in *Kaufman* v. *Liberty Mutual Insurance Company* 245 F. 2d 918, 920 (3rd Cir. 1957), "the party asserting it has the burden of proving all the jurisdictional prerequisites," even though both parties have stipulated to the existence of the necessary jurisdictional facts.

[2] A careful examination of the record requires the denial of appellant's contention that the discovery rulings in the order of September 26, 1966, prevented her from securing information which might have justified a piercing of the corporate veil. Although defendant had several subsidiaries in September 1964, when this suit was instituted, the record shows that only one subsidiary did business in Delaware, whereas defendant furnished administrative services (just as logically a part of its business as a holding company) for several of its subsidiaries, including the Delaware subsidiary, in New Jersey. Cases dealing with the principal place of business of a subsidiary which does business with its parent have looked to the specific business done by each corporation in determining the principal place of business of each corporation. See *Epstein* v. *Gilford Industries, Inc.,* 218 F. Supp. 286 (S. D. N. Y. 1963); *Inland Rubber Corporation* v. *Triple A Tire Service, Inc.,* 220, 490 (S. D. N. Y. 1963).

Appendix A

Appellant's contention that 28 U.S.C. §1332(c) applies only as a limitation on the power of a corporation to remove an action from a state court to the federal court is rejected. See *Canton* v. *Angelina Casualty Company*, 279 F. 2d 553, 554 (5th Cir. 1960); 1 Moore, Federal Practice, § 0.77 [1.2], p. 717.6, n. 10 (2nd Ed. 1964).

The order of the District Court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 16542

MARY CARNERA, General Administratrix of the Estate of Severino Carnera, deceased; and MARY CARNERA, Administratrix *ad Prosequendum* of the Estate of Severino Carnera, deceased,

Appellants,

vs.

LANCASTER CHEMICAL CORPORATION.
(D. C. Civil No. 874-64)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: HASTIE, FREEDMAN and VAN DUSEN,

Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

Appendix B

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed January 18, 1967, be, and the same is hereby affirmed, with costs.

ATTEST:

THOMAS F. QUINN
Clerk

December 8, 1967

APPENDIX C

Opinion of the United States District Court for the District of New Jersey

The Court: Well, gentlemen, I think I have lived with the case for a year now, particularly on the very questions that are involved here.

This was an action, as I recall, for personal injuries or death under the Products Liability Act.

I know that sometime last year there was a hearing, whether it was on interrogatories or some other facet of the case, and at that time the Court indicated to counsel that there was a certain question in the Court's mind of jurisdiction presented by the pleadings.

The plaintiff's suit is based upon diversity of citizenship, the plaintiff being a New Jersey citizen and the defendant, I believe, was incorporated in New York, if I am correct.

Mr. Hughes: Yes, your Honor.

The Court: The problem arose at that time, and is still present with us, concerning the principal place of business or the conduct of business activities of the defendant.

Plaintiff contends there is dual diversity under Section 1332(c) and, further, that because of the interconnection by the defendant corporation and other corporations and subsidiaries in some states, New York, and another state is Delaware, that there is established sufficient diversity to support Federal jurisdiction in this particular case.

Plaintiff refers to legislative history of 1332. Professor Moore, in his treatise, referred to this when he stated the basis of diversity, that a corporation is a citizen of the state wherein it is incorporated and if it has its principal place of business in another state it is also a citizen of the latter state. Thus a local corporation is no longer

able to gain access to the Federal Courts merely because it has been chartered in another state.

Both restrictions in regard to the higher jurisdictional amount and the dual corporate citizenship were made applicable to remove as well the principal jurisdiction.

The plaintiff's second ground appears to rest on the theory that the defendant corporation did not have its principal place of business in New York but in some other state, and upon inquiry the plaintiff still is unable to state which state, whether it be New York, Delaware or New Jersey, that it does have its principal place of business.

I think at the time of one of the motions that we had before this particular one I stated that such an allegation was insufficient to establish diversity and I think I mentioned to the plaintiff at that time that the plaintiff must show affirmatively—must affirmatively allege both the state of incorporation and the principal place of business while the plaintiff in its brief seems to indicate that Delaware is the principal place of business, or the state of incorporation—the principal place of business of the defendant Lancaster.

At this particular hearing he seems to indicate that he is not sure of that. Of course, I am not too much concerned with the fact that there were interlocking corporations or that some other corporations did share the warehouse facilities which Lancaster operated at Carlstadt, New Jersey, and it also has been affirmatively shown, and shown to the knowledge of the plaintiff, that another corporation with which Lancaster, so I understand, owned a major share of stock, that is, Gordon Chemical, did operate in New Jersey but that such an operation ceased in December of 1964, which was some two or three months before this action was commenced, or at the time this action arose.

Appendix C

It is also indicated in the depositions and in the pleadings that the Delaware corporation shared its personnel at the Lancaster plant in Carlstadt.

I think we should keep in mind the holding of the Kelly v. United States Steel Corporation case, which was decided in the Third Circuit in 1960, wherein, speaking of business activities, the Circuit Court stated that it is the activity rather than the occasional meeting of policy-making directors which indicated the principal place of business.

I think in this particular case there is some testimony that meetings were held other than at Lancaster but that at all times, and particularly at the time of the happening of the event in question here, that the president of Lancaster Chemical Company maintained his offices at Carlstadt, New Jersey.

It seems to me that under the Kelly case that the main place of concentration of activities, or business of the defendant Lancaster Chemical Company, was located in Carlstadt, New Jersey, and that seemed to be indicated from all the depositions, from the pleadings, from the affidavits and all the papers that were filed in this case. This being so, I am of the opinion that the motion on the part of the defendant for dismissal for lack of jurisdiction in this case should be granted.

My Clerk reminds me concerning Gordon. I think the transcript, Page 42, of Mr. Honohan's testimony, is that Gordon Chemical, Incorporated, ceased to exist in December 1964.

Mr. Hughes: Thank you, sir.

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vs.

LANCASTER CHEMICAL CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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GERALD W. CONWAY,
On the Brief.

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Statute Cited

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Other Authorities Cited

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1 Moore, Federal Practice (2d Ed., 1964):

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

Counter-Statement of the Case

Respondent, Lancaster Chemical Corporation, adopts the citations to opinions below, jurisdictional statement, state-

ment of question presented and reference to statute involved as set forth in the Petition for Writ of Certiorari filed herein (Pet. 2).

This is a wrongful death action wherein both petitioner and her decedent are citizens of New Jersey. Jurisdiction of the District Court was sought to be based solely upon diversity of citizenship. The complaint alleged that respondent was a corporation organized under the laws of the State of New York with "plant and facilities in the Town of Carlstadt, Bergen County, New Jersey". There was no specific allegation at all as to respondent's citizenship.

During the course of pretrial proceedings, it appeared that respondent's plant and facilities in the Town of Carlstadt constituted its principal place of business, and that, accordingly, the District Court lacked subject matter jurisdiction in light of the 1958 amendment to 28 U.S.C.A. §1332(c). Petitioner was permitted to engage in further discovery proceedings directed to the jurisdictional issue, after which the Court *sua sponte* moved to dismiss the action for lack of jurisdiction. Following a hearing on the motion, the Court found as a fact that respondent's principal place of business was situate in the Town of Carlstadt, New Jersey, and concluded that respondent was therefore a citizen of New Jersey for diversity purposes under 28 U.S.C.A. §1332(c). Final judgment of dismissal for lack of jurisdiction over the subject matter was thereafter entered (App. C, Pet. 6a).

On petitioner's appeal to the Court of Appeals, the judgment of the District Court was affirmed (App. A, Pet. 1a; App. B, Pet. 4a).

Petitioner does not appear to challenge the factual findings below that respondent's principal place of business

within the meaning of 28 U.S.C.A. §1332(c) was situate in New Jersey. Rather, the sole contention now raised is that the 1958 amendment to 28 U.S.C.A. §1332(c), which provides that for diversity purposes "a corporation shall be deemed a citizen of any State by which it has been incorporated *and of the State where it has its principal place of business,*" applies only against corporate litigants which seek to invoke the diversity jurisdiction of the Federal Court, and was not intended to apply to preclude an individual from suing a foreign corporation irrespective of the location of its principal place of buisness (Pet. 3).

Reasons Why the Writ Should Not Be Granted

A review of petitioner's contention regarding the construction of 28 U.S.C.A. §1332(c) demonstrates beyond reasonable debate a complete lack of any substance or merit. Furthermore, there is absolutely no real or apparent conflict between the decision of the lower courts herein and any applicable decision of this Court, nor is there any decision of any other Court of Appeal which in any way conflicts with the determination below. *Cf.* U. S. Sup. Ct. Rule 19, U.S.C.A. Petitioner's assertion (Pet. 2) that "the opinion below so far departs from the accepted and usual course of judicial proceedings as to warrant the exercise of this Court's supervision," is nothing more than specious.

ARGUMENT

28 U.S.C.A. §1332(c) precludes diversity jurisdiction of an action by an individual citizen of the forum state against a foreign corporation which maintains its principal place of business in the forum state.

28 U.S.C.A. §1332(c) provides that for purposes of diversity jurisdiction, "a corporation shall be deemed a citizen of any State by which it has been incorporated *and*

of the State where it has its *principal place of business.*" (Emphasis added.) By reason of this section, corporations are said to have a "dual citizenship" for diversity purposes, so that a complaint against a corporate defendant must not only alleges the state in which the defendant was incorporated, but also the state wherein its principal place of business is located, so as to show that *both* such states of citizenship are diverse from that of the plaintiff. *Buell* v. *Sears Roebuck & Co.*, 321 F. 2d 468, 470 (10th Cir. 1963); *Dining Car Emp. Local No. 385* v. *Chicago, M., St. P. & P. R. Co.*, 323 F. 2d 224, 226-227 (7 Cir. 1963); *Testa* v. *Moore-McCormick Lines, Inc.*, 229 F. Supp. 154, 155 (S. D. N. Y. 1964); *Brandt* v. *Bay City Super Market*, 182 F. Supp. 937 939 (N. D. Cal. 1960). Where, as here, the complaint fails to allege the principal place of business of a corporate defendant, such omisison is fatal to the jurisdiction of the District Court, and alone justifies the dismissal of the action. *Dining Car Emp. Local No. 385* v. *Chicago, M., St. P. & P. R. Co., supra; Testa* v. *Moore-McCormick Lines, Inc., supra.*

It cannot be seriously disputed that the purpose of the 1958 amendment to 28 U.S.C.A. §1332 was to reduce congestion in the Federal Courts by curtailing their jurisdiction in diversity cases where jurisdiction is based on the fictional premise that a corporation, although essentially local in character, is nevertheless deemed a citizen of some other state because it was incorporated there. *Moore-McCormack Lines Inc.* v. *Ingalls Shipbuilding Corp.*, 194 F. Supp. 412 (S. D. N. Y. 1961); *Johnson* v. *Angelina Cas. Co.*, 177 F. Supp. 85, 87 (E. D. Tex. 1959), affirmed *sub nom., Canton* v. *Angelina Casualty Company*, 279 F. 2d 553 (5 Cir. 1960); *Harker* v. *Kopp*, 172 F. Supp. 180, 182 (N. D. Ill. 1959).

Petitioner contends, however, that the provisions of 28 U.S.C.A. §1332(c) are not applicable to a citizen-plaintiff of

New Jersey who files suit in a Federal Court against a defendant New York corporation, despite the presence of the principal place of business of the defendant in New Jersey. There is nothing in the language of the statute which supports this novel proposition, and the only authority cited by petitioner is a reference to certain remarks by Congressmen Smith, Celler and Keating during the course of debate on H.R. 11102, which subsequently was enacted as the amendment in question to 28 U.S.C.A. §1332. Although the remarks do point up the fact that the primary evil sought to be remedied arose out of the removal of state-court actions by corporate defendants, the resultant evil is the same whether it be the corporation itself, or an individual suing it, that brings an essentially local dispute into the Federal Court on the technical and fictional ground that the corporation happened to have been organized elsewhere. Thus, as is apparent from the further remarks of Congressman Keating during the course of debate, it seems clear that the amendment was intended to apply to *all* cases in the Federal Courts "brought by *or against* corporations having their principal place of business in the same State of which the other party was a resident . . .," and thus, that it precludes an individual citizen of the forum state from suing a foreign corporation in the Federal Court, where the foreign corporation has its principal place of business in the forum state. See 1958 Congressional Record (Vol. 104, Part 10), p. 12685, col. 1. (Emphasis added.) Furthermore, the foregoing interpretation of the 1958 amendment has been uniformly accepted by the lower Federal Courts in subsequent decisions. *Canton* v. *Angelina Cas. Co.*, 279 F. 2d 553 (5 Cir. 1960); *Martin* v. *Winn-Dixie Stores*, 242 F. Supp. 533 (W. D. S. C. 1965); *Huggins* v. *Winn-Dixie Greenville, Inc.*, 233 F. Supp. 667 (S. D. S. C. 1964); *Anderson* v. *Southern Bell Telephone & Telegraph Co.*, 209

F. Supp. 921 (M. D. Ga. 1962). As stated in 1 *Moore, Federal Practice,* §.77 [1.-2], p. 717.6, n.10 (2d ed. 1964):

> "It is clear that the new amendment applies to prevent natural citizens of the state in which the corporation has its principal place of business from suing the corporation, although it be chartered in another state, in the federal courts."

See also, authorities collected at *id.*, §0.77 [2.1], pp. 717.40-717.41, nn. 2-3.

In passing, it might also be noted that, as stated by Congressman Celler in the course of debate on the amendment in question:

> "The underlying purpose of diversity of citizenship legislation, which incidentally goes back to the beginning of the Federal judicial system, having been established by the Judiciary Act of 1789, is to provide a separate forum for out-of-state citizens against the prejudices of local courts and local juries by making available to them the benefit and safeguards of the Federal Courts." 1958 Congressional Record 12685, col. 2.

See also *Pease* v. *Peck*, 59 U. S. 595, 15 L. Ed. 518 (1855); *Lutz* v. *McNair*, 233 F. Supp. 871, 873 (E. D. Va. 1964), affirmed 340 F. 2d F. 2nd 709 (4 Cir. 1965); *Browne* v. *Hartford Fire Insurance Company*, 168 F. Supp. 796, 797 (N. D. Ill. 1959). Since petitioner herself is a citizen and resident of New Jersey, she is hardly in a position to complain of any local prejudice against her. Hence, there is no good reason why the doors of the Federal Courts in New Jersey should be open to her in the first place. Indeed, if the 1958 amendment to 28 U.S.C.A. §1332 were not applied to petitioner, she would then be permitted to

burden the Federal Court of her own State with an essentially tort action merely because the corporate defendant happened to have been incorporated in New York, thus perpetuating the very kind of jurisdictional abuse which the 1958 amendment was avowedly designed to eliminate.

It is accordingly submitted that there exists in this case no substantial issue of federal law or procedure which would justify review by this Court, and thus, no basis upon which to grant a writ of *certiorari*.

CONCLUSION

For all the foregoing reasons, it is respectfully urged that the petition for a writ of certiorari be denied.

Respectfully submitted,

JOHN J. BUDD,
Counsel for Respondent.